Filed 3/29/10 In re J.G. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.G., Defendant and Appellant.	F057712 (Super. Ct. No. 510371) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Nan Cohan Jacobs, Judge.

Cathryn E. Lintvedt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jennevee H. de Guzman, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

*Before Dawson, Acting P.J., Hill, J. and Kane, J.

Appellant J.G. was charged in a Welfare and Institutions Code 602[1] petition filed on September 12, 2008, with assault likely to produce great bodily injury and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). It was further alleged that appellant personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)) and that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)). Appellant admitted the assault charge and the enhancements were dismissed. At the contested dispositional hearing on April 14, 2009, the juvenile court set the aggregated maximum time of confinement at 62 months and committed him to the Department of Juvenile Justice. The court further ordered appellant to register as a gang member (Pen. Code, § 186.30, subd. (b)(3)).

Appellant now challenges the maximum period of confinement on the ground that he did not receive notice of intent to aggregate in the current petition. Having examined all of the facts, we find the omission harmless beyond a reasonable doubt. Appellant also contends, and respondent concedes, that it was error to require him to register as a gang member because there was insufficient proof adduced at the dispositional hearing to show that appellant's offense was gang related. We agree and remand for further proceedings.

PROCEDURAL HISTORY

In November of 2007, appellant admitted an allegation contained in a section 602 petition (prior petition) that he committed assault with force likely to produce great bodily injury. The petition alleged that appellant, "a self-admitted Norteno gang member," punched and kicked a student multiple times because of the student's affiliation with the Surenos, a rival gang. Allegations that he committed a battery with serious bodily injury were dismissed. The juvenile court declared appellant a ward of the court, set the maximum term of confinement at 48 months, committed him to juvenile hall for 110 days, and placed him on probation. As part of his probation terms, he was

[1]All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

ordered not to be a member of a gang or to associate with any person known to be a gang member.

In April of 2008, appellant admitted a violation of probation (§ 777), and the juvenile court committed appellant to juvenile hall for a period of 60 days.

In May of 2008, appellant admitted a second 602 petition (prior petition) that he committed misdemeanor battery (Pen. Code, § 242). The petition alleged that appellant, along with possibly three others, assaulted two male teenagers. An allegation that he committed a second misdemeanor battery was dismissed with a *Harvey*[2] waiver. The juvenile court set the aggregated maximum confinement time at 50 months, continued appellant as a ward of the court, committed him to juvenile hall for 16 days, and placed him on probation.

On September 12, 2008, a third section 602 petition (the current petition) was filed alleging that appellant committed an assault likely to produce great bodily injury and assault with a deadly weapon, that he personally inflicted great bodily injury and that the offense was committed for the benefit of a criminal street gang. The petition alleged that appellant and another boy attacked the victim with a crowbar and yelled "RVL" (for Riverbank Varrios Locos, a Norteno gang) while chasing the victim. On the petition, the box notifying appellant that "[p]etitioner intends to move for an increase of the maximum term of confinement by aggregating the terms of all previously sustained petitions known to petitioner at the time of disposition" (intent to aggregate) was *not* marked. On that same date, notice was filed stating that appellant was ineligible for a deferred entry of judgment disposition.

A probation officer's report was prepared. It referenced appellant's prior record and recommended that he be found not a fit and proper subject to be dealt with under the juvenile court law. A motion for same was later withdrawn by the district attorney.

---

[2] *People v. Harvey* (1979) 25 Cal.3d 754.

On December 17, 2008, appellant admitted the assault with a deadly weapon allegation. The allegation that he personally inflicted great bodily injury was dismissed, as was the gang allegation, which the prosecutor stated he was "not ready to proceed on …." The juvenile court set the total possible maximum commitment time at 48 months.

On December 30, 2008, the probation department filed a dispositional social study referencing appellant's prior record, the current offense with a maximum confinement period for that offense of 48 months (four years), and the recommendation that the juvenile court set the "maximum confinement at 62 months … based upon the facts and circumstances of the matter or matters, which brought or continued the minor under the jurisdiction of the juvenile court."

At the contested dispositional hearing on April 14, 2009, the juvenile court began the hearing with the statement that it had reviewed the probation report, which had recommended appellant be committed to the Department of Juvenile Justice, and that appellant had requested a contested hearing on that recommendation.

Appellant called Probation Officer David Costa, who had recommended appellant be committed to the Department of Juvenile Justice, and questioned why he had not recommended appellant for a group home. Costa testified that, because of appellant's previous charges, the increasingly violent nature of the charges, and the fact that they were all gang related, appellant was considered a danger to himself and others in a group home. On cross-examination, Costa testified that, despite giving appellant an opportunity to make a statement, appellant had never renounced being a Norteno member. According to Costa, the victim in the current offense was associated with the rival Sureno gang and knew appellant to be involved with the RVL, a Norteno sect from Riverbank.

Appellant testified that he had been involved with the RVL gang prior to being placed in juvenile hall seven months ago, but that he was no longer associated with the gang. On cross-examination, appellant claimed he never associated with the RVL and that he was not the one who shouted "RVL" during the current offense. He went on to

insist that the attack was committed in self-defense. Appellant acknowledged that he affiliated with the Nortenos at the time of his first section 602 petition; he also acknowledged that his parents were concerned that he brought gang members to the house.

Deputy Sheriff Gerald Cosby testified that he had investigated five to ten gang-related cases, but had not received specific training on that subject. Cosby testified that the other person present with appellant when he committed the current offense was A.A., and that A.A. and appellant were "associates."

Following testimony, the juvenile court recounted appellant's current offense and his prior criminal history and set the aggregated maximum time for confinement at 62 months: one year for the first prior petition; two months for the second prior petition; and four years for the current petition. In doing so, the court stated that it had discretion as to how much time it could impose: "I can order the least amount of time or I can order up to the maximum, which is 62 months." The court also made a finding that the current offense was gang related and ordered appellant to register as required pursuant to Penal Code section 186.30.

DISCUSSION

1. Notice of Intent to Aggregate Confinement Time

Appellant contends the juvenile court violated his due process right by failing to provide notice of intent to aggregate in the current petition. Assuming without deciding that the point was not forfeited by the absence of contemporaneous objection, we find the omission harmless beyond a reasonable doubt.[3]

---

[3]Absence of notice of intent to aggregate in the current petition did not result in an unauthorized sentence. "Although the cases are varied, a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) While "legal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement … [i]t does not follow … that nonwaivable error is involved whenever a prison sentence is challenged on appeal. [Citation.]" (*Ibid.*, fn. omitted.) In this case, the maximum confinement time of 62 months was not precluded by statute and the court did not violate

When a juvenile court sustains criminal violations resulting in an order of wardship and removes a minor from the custody of his or her parents, it must specify the maximum confinement term, which must not be longer than the maximum term of imprisonment an adult would receive for being convicted of the same offense or offenses. When computing the maximum confinement term, the court possesses discretion to aggregate terms on the basis of multiple counts or petitions. (*In re Adrian R.* (2000) 85 Cal.App.4th 448, 454.)

"[W]here the prior offenses are to be considered to aggregate the maximum term to extend it beyond that which could be imposed for the new offense, due process requires notice of the juvenile court's intention in order to provide the minor with a meaningful opportunity to rebut any derogatory material within its prior record. [Citations.]" (*In re Michael B.* (1980) 28 Cal.3d 548, 553 (*Michael B.*).)

> "When read together, sections 656, 656.1, 700, 702, 776 and 777 demonstrate a clear legislative intent to require advice to the minor of possible consequences, including the maximum period of physical confinement, at the detention or jurisdictional hearing, or at some point before an admission is accepted or a contested jurisdictional hearing commences. [Citations.]" (*In re Richard W.* (1979) 91 Cal.App.3d 960, 978, fn. omitted.)

No particular form for the requisite notice is required. (*In re Steven O.* (1991) 229 Cal.App.3d 46, 56.) Providing notice of intent to aggregate in the current petition satisfies this requirement. (*Ibid.*) If the petition does not contain notice of intent to aggregate, the appellant bears the burden of showing prejudice under the harmless beyond a reasonable doubt standard of review. (*Id.* at p. 57; *Michael B.*, *supra*, 28 Cal.3d at p. 555; *In re Richard W.*, *supra*, 91 Cal.App.3d at p. 980.) If prejudice is shown, then the matter is remanded for redetermination of the maximum permissible term of confinement "'by means of procedures which give fair notice to the minor and an

---

mandatory provisions governing the legal period of confinement. Therefore, the sentence was not unauthorized.

opportunity to be heard.' [Citations.]" (*Michael B.*, *supra*, at p. 555; *In re Edwardo L.* (1989) 216 Cal.App.3d 470, 476.)

In *In re Steven O.*, *supra*, 229 Cal.App.3d 46, this court held that even though the petition failed to provide the minor with notice of intent to aggregate, no prejudice resulted because of the following four reasons: (1) the minor denied the allegations contained in the petition and the matter proceeded to a contested jurisdictional hearing; (2) a written probation report expressly recommending aggregation was prepared prior to the disposition hearing; (3) at the detention hearing, neither the minor nor his counsel registered any objection to or surprise with the recommendation, implying they "knew and understood the court's power and intention to aggregate time," and (4) the only argument presented regarding disposition was that the minor should be committed to a local camp rather than to the Department of Juvenile Justice. (*Id.* at p. 57.)

Here, the only distinction between *Steven O.* and appellant's case is that (1) appellant admitted the assault allegation contained in the current petition rather than contest it. The remaining factors are on point with *Steven O.*: (2) A written probation report expressly recommending aggregation was prepared prior to the dispositional hearing, in this case more than three months before the hearing; (3) at the detention hearing, neither appellant nor his counsel registered any objection to or surprise with the recommendation, implying that they knew and understood the court's power and intention to aggregate time, and (4) the only argument presented regarding disposition was that appellant should be committed to a group home rather than to the Department of Juvenile Justice.

And while appellant did not receive specific notice of the intent to aggregate before or at the time he admitted the current petition, he did have notice of the prior offenses to be relied on before that hearing. Notice was filed on the same date the current petition was filed notifying him that he was ineligible for deferred entry of judgment, and the detention report, which was filed three months before he admitted the current petition, set forth the prior and the current offenses.

We thus conclude that, although the current petition did not give appellant express notice of intent to seek aggregation of confinement time, the error in failing to include notice in the petition was harmless beyond a reasonable doubt. (*Michael B.*, *supra*, 28 Cal.3d at p. 555.)

2. Requirement to Register as a Gang Member

Appellant contends, and respondent concedes, the evidence was insufficient to support the court's finding that the admitted offense was "gang related" within the meaning of Penal Code section 186.30, subdivision (b)(3). Specifically, appellant asserts the record does not prove that (1) one of the gang's primary activities was the commission of any crime enumerated in section 186.22, subdivision (e)(1) though (25), and (2) the gang's members individually or collectively have engaged in a pattern of criminal gang activity.

Whether appellant's offense was gang related is subject to proof by a preponderance of the evidence. (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 944.) Thus, the court's finding that the instant offense was gang related will be supported by sufficient evidence only if the court reasonably could have found, based on a preponderance of evidence that is reasonable, credible, and of solid value supporting "each element of gang relatedness." (*Ibid.*) A crime is gang related if it pertains to a criminal street gang as defined in section 186.22, subdivisions (e) and (f). (*In re Jorge G.*, *supra*, at p. 944.) "The elements of this definition require: (1) an ongoing organization or group, (2) of three or more persons, (3) having as one of its primary activities the commission of the crimes enumerated in section 186.22, subdivision (e)(1)-(25), (4), having a common name or symbol, and (5) whose members individually or collectively have engaged in a pattern of criminal gang activity." (*Ibid.*)

> "To support element (3), there must be substantial evidence that the commission of offenses enumerated in section 186.22, subdivision (e), is a primary activity of the gang. 'Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities.' [Citation.] However, evidence sufficient to show only *one*

> offense is not enough. [¶] 'The phrase "primary activities," as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's "chief" or "principal" occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members.… [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute.' [Citation.] [¶] We recognize that a gang's primary activities may be shown though [*sic*] expert testimony [citations] …. [¶] To support element (5), there must be substantial evidence of at least two predicate offenses committed within the specified time frame by the minor or other members of his gang." (*In re Jorge G.*, *supra*, 117 Cal.App.4th at pp. 944-945.)

Here, there was testimony by appellant and others that appellant was a gang member. But there was no evidence whatsoever before the trial court that tended to prove that the gang to which appellant was supposed to be a member of was in fact a group that, as one of its primary activities, committed any of the crimes enumerated in section 186.22, subdivision (e)(1) through (25), nor was there any evidence of two predicate offenses committed by the appellant or other members of the gang. Even appellant's admission that he was a gang member would only go part of the way to the necessary proof. However appellant characterized the group with which he associated, it could not be found to be a gang within the meaning of section 186.30 unless and until the prosecutor proved that particular group was of the type described in section 186.22, which the prosecutor failed to do. We will therefore reverse the finding and the associated order that appellant register as a gang member.

The People may present evidence on the topic on remand. As we said in *Jorge G.*,

> "[a]lthough we reverse the order to register, we conclude the People are entitled to present sufficient evidence in light of the definition and standard of proof that we set forth in [the] opinion. [¶] In doing so, we conclude that a second disposition hearing will not violate the prohibition on double jeopardy.… [¶] Nor would the imposition of registration upon remand, if the court makes the requisite findings based on sufficient evidence, be prevented by the doctrines of res judicata, collateral estoppel, or law of the case." (*In re Jorge G.*, *supra*, 117 Cal.App.4th at pp. 946-947.)

DISPOSITION

The juvenile court's finding that appellant's violation of section 245, subdivision (a)(1) was gang related within the meaning of section 186.30, subdivision (b)(3), and the court's order that appellant register as a gang member pursuant to that statute, are reversed. The case is remanded to the juvenile court for a limited dispositional hearing, if requested by the People within 30 days of the issuance of the remittitur, on the question whether appellant's offense was gang related. After the hearing, the court shall enter the appropriate order. The judgment is otherwise affirmed.